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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

S. MARTIN GORDON; ERIC OLE THORSEN
and JOEL J. FLICK,

Petitioners,

vs.

THE COUNTY OF ROCKLAND,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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PRELIMINARY STATEMENT

Although the jury expressly concluded that petitioners' "party affiliation was [not] an appropriate requirement for the effective performance of the public office" (App. 19), respondent improperly re-argues the facts in an attempt to "prove" petitioners were "high level" municipal attorneys and held "confidential, policymaking positions." Resp. Brief at 1, 13.

Respondent accuses petitioners of "grossly distort[ing] the facts." Resp. Brief at 1. In fact, petitioners have cited from the record, which is consistent with the jury's inherent finding that they lacked discretionary or policymaking duties and

would have competently performed under a Democratic or Republican administration.

In contrast, it is respondent who misquotes the record to argue that petitioners held political jobs exempted from First Amendment protection.

First, respondent states that the County Attorney, Paul Nowicki, "explained" that he terminated petitioners "because he wanted to produce an office that could work better with the new administration." Resp. Brief at 5 (citing A-180). In fact, respondent is really citing the testimony of the County Executive, C. Scott Vanderhoef, who was quoting Nowicki's hearsay statements. A-180). Vanderhoef testified that he could neither recall (1) if Nowicki had so advised him nor (2) what they discussed about petitioners. (SA-274). Vanderhoef also testified that Nowicki wanted petitioners terminated on account of their job performance. *See*, SA-276 ("[Nowicki's] view was we could do better having three other individuals in those particular positions, better for performance")(SA-275-76). Although the jury rejected this explanation, Vanderhoef made clear that — contrary to respondent's position on appeal — respondent was not contemporaneously concerned with petitioners' political incompatibility.

Indeed, the jury verdict is consistent with Nowicki's testimony that his assistants were professionals who would do "whatever has to be done" to solve a legal problem. (Resp. Brief at 5). That testimony reflects a non-political, results-oriented lawyering style that petitioners were qualified to handle. *See also,* A-183 (Vanderhoef testified that he relied on assistant county attorneys to do a thorough, competent and professional job).

Respondent also asserts that petitioners held policymaking positions since Nowicki's Democratic predecessor, Ilan Schoenberger, listed Tarsen and Gordon second and third in the line of succession. Resp. Brief at 1. In fact, the County Attorney was required to list deputies (as opposed to assistants) who can serve in his stead. (A-241-42). Schoenberger listed one deputy, Patricia Zugibe. (A-45). Listing petitioners

as assistants bears no relevance to their discretionary or policymaking authority. In fact, Nowicki, a Republican, retained Zugibe, a Democrat, as his deputy. (A-243) He himself apparently believed he could meet his needs in a non-political manner.

Finally, respondent continues to represent that Flick worked under a broad job description despite its failure to refute his consistent denials that it covered him. *Compare,* Resp. Brief at 10, with Petition at 6-7. In fact, Flick's duties -- assuring that local contracts complied with federal rules and regulations -- were neither discretionary nor political. Petition at 6-7.

ARGUMENT

POINT I

THE SECOND CIRCUIT OPINION EFFECTIVELY FORECLOSES GOVERNMENT ATTORNEYS FROM *ELROD-BRANTI* PROTECTION

In asserting that petitioners were high-ranking attorneys who performed policy-making duties, respondent argues that the decision below was not so sweeping as to exempt attorneys from First Amendment protection. However, since the Second Circuit (1) grounded its holding on job duties common to nearly all government attorneys although (2) the jury expressly concluded that petitioners' "party affiliation was [not] an appropriate requirement for the effective performance of the public office" (App. 19), petitioners are hard-pressed to imagine what First Amendment protection remains for other government lawyers who, like themselves, are not vested with discretionary or policymaking duties.

In its brief, respondent does not address the jury's express factual determination. Respondent also fails to defend the Second Circuit's sweeping and conclusory finding that "[i]t is difficult to fathom how [functioning as a liaison and advisor to a policymaking commission] can be undertaken and done well without their 'political or social philosophy [making] a difference in the implementation of programs.'" App. 10 (first

modification supplied) (citation omitted). The Circuit Court ignored this Court's counsel that (1) governmental officials may secure the loyal implementation of policy by dismissing *high level* employees holding contrary political views. *See*, *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 74 (1990). The court below also ignored this Court's statement that mutual confidence and trust can exist between attorneys of competing political parties. *Branti v. Finkel*, 445 U.S. 507, 520, n.14 (1980).

Moreover, the conclusion that competent government attorneys cannot put aside their party affiliation and faithfully represent a municipality on such non-political matters as highways, sewers, parks and government contracts suggests that the Second Circuit has effectively exempted *all* government attorneys from the First Amendment's reach, not just high-ranking lawyers vested with discretionary and policy-making duties.[1] Although petitioners' written job descriptions resemble those of other low-level government attorneys and required them to represent the municipality's interests, respondent did not -- and could not -- establish that there was a "Republican" as opposed to "Democratic" way for petitioners to discharge their responsibilities.

Finally, respondent misreads the decision below as concluding that petitioners' "positions were ones where party affiliation was an appropriate requirement for job performance." Resp. Brief at 13 (citing *Gordon v. County of Rockland*, 110

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[1] Citing *Tavano v. County of Niagara*, 621 F.Supp. 345 (W.D.N.Y. 1985), *aff'd* 800 F.2d 1128 (2d Cir. 1986) (table), respondent argues that the Second Circuit will protect government attorneys "if the appropriate facts are alleged." Resp. Brief at 14. However, the Second Circuit expressly distinguished *Tavano* on the ground that the district court's conclusion that the plaintiffs were entitled to First Amendment protection was not essential to the decision "and carries no precedential weight." App. 10-11, n.7. The Second Circuit affirmed summarily since the decision turned on the factual issue of whether the terminations were politically motived. Also, the Second Circuit noted that *Tavano*, a district court decision, predated binding circuit opinions that informed the decision below. *Id.*

F.3d 886, 892 (2d Cir. 1997)). The Second Circuit did not frame the issue that way; rather, it concluded that, "because of the discretion with which they are charged, and because of their authority to act on behalf of the County, [petitioners] are politically accountable to the Legislature and the County Executive that their loyalty helps ensure that the mandate of the electorate is effectively carried out." *Gordon*, 110 F.3d at 892. As the certiorari petition makes clear, the Second Circuit has departed from *Branti* and applied a "shared ideology" rather than "political party affiliation" test to determine whether the First Amendment protects a government plaintiff from patronage termination. The Second Circuit's test more narrowly construes the First Amendment and reflects an inter-circuit conflict that this Court should settle. *See, Point II, infra.*

POINT II

THE DECISION BELOW REVEALS AN INTER-CIRCUIT SPLIT AS TO THE PROPER APPLICATION OF *BRANTI*

Respondent states inaccurately that the Second Circuit has not split with other circuits over *Branti*'s proper application. This is not so. Some circuits are faithful to *Branti* and ask whether "*party affiliation* is an appropriate requirement for the effective performance of the public office involved. *Branti*, 445 U.S. at 518 (emphasis supplied). Others, like the Second Circuit, frame this threshold inquiry more broadly and make it easier for government employers to effect patronage terminations. *See*, App. 8 ("In *Savage*, we interpreted *Branti* to mean that 'political affiliation is an appropriate requirement when there is a rational connection between *shared ideology* and job performance'") (citing *Savage v. Gorski*, 850 F.2d 64, 68 (2d Cir. 1988)) (emphasis supplied). The Eleventh Circuit has expressly recognized this inter-circuit conflict. *See*, *Parrish v. Nikolits*, 86 F.3d 1088, 1093 (11th Cir. 1996).[2] The

[2] In defending the Second Circuit's patronage cases, respondent argues that the so-called "*Vezzetti* factors" are intended to assist lower courts and do not limit *Branti*. Resp. Brief at 20. However, respondent does not

(Footnote continued)

Second Circuit departed from this Court's clear instruction that party affiliation, not ideology, controls the propriety of patronage terminations. *Id.*

Respondent's attempts to minimize this inter-circuit conflict are not persuasive. The certiorari petition cites opinions from the First, Fourth, Seventh and Eighth Circuits which have applied the broad test adopted by the Second Circuit. Pet. at 15-16. Although, as respondent notes, these circuits recognize *Branti* as controlling authority, they have restricted its application by asking whether shared ideology, as opposed to party affiliation, bears any relevance to effective job performance. *See, i.e.*, *Akers v. Caperton*, 998 F.2d 220, 225 (4th Cir. 1993) ("[w]e conclude that there is no rational connection between shared ideology and the performance of this low-level job"); *Jiminez Fuentes v. Torres Gaztambide*, 807 F.2d 236, 241-42 (1st Cir. 1986); *Tomczak v. City of Chicago*, 765 F.2d 633, 641 (7th Cir. 1985); *Barnes v. Bosley*, 745 F.2d 501, 508 (8th Cir. 1984).

The Eleventh Circuit has recognized that these different tests are not merely semantic. *See*, *Parrish*, 86 F.3d at 1093 ("In reading *Branti* this way, we fall into line with those circuits interpreting *Branti* as teaching that party affiliation must be essential to effective performance of a position before an employee holding that position can be susceptible to patronage dismissal. . . . We part ways with those circuits that allow patronage dismissals in policymaking positions that do not directly implicate partisan political concerns") (citations omitted).

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address petitioners' position that several of the factors either directly contradict *Branti* or apply to nearly every public employee who holds a non-competitive position. *See*, Petition at 14. Critically, the Second Circuit expressly designed the *Vezzetti* factors "to determine whether 'there is a rational connection between shared ideology and job performance.'" *Vezzetti v. Pellegrini*, 22 F.3d 483, 486 (2d Cir. 1994) (citations omitted). As petitioners have emphasized, that test departs from *Branti*'s counsel and sets the Second Circuit apart from other circuits.

Critically, while challenging petitioners' argument that the circuits have inconsistently applied *Branti*, respondent has not addressed their contention that, had the Second Circuit faithfully applied that case, it would not have reversed the district court. Specifically, the Second Circuit would not have credited respondent's argument that it could fire petitioners to obtain loyal assistant county attorneys to effectuate the electorate's mandate. App. at 12-13. This reasoning does not address the *Branti* test: whether party affiliation affected petitioners' job performance. *Branti*, 445 U.S. at 518. Rather, it satisfies the Second Circuit's test which expressly modified *Branti* — whether shared *ideology* relates to effective job performance. *See*, *Savage*, 850 F.2d at 68.

As the Second Circuit (1) has departed from *Branti*'s test governing the propriety of patronage dismissals and (2) conflicts with other circuits for which political affiliation, not ideology, is the touchstone, certiorari is proper.

POINT III

THE DECISION BELOW REVEALS AN INTER-CIRCUIT SPLIT AS TO WHETHER ACTUAL OR INHERENT JOB DUTIES CONTROL THE *ELROD-BRANTI* INQUIRY

Respondent attempts to hide the inter-circuit split on the issue of whether courts should resolve the *Elrod-Branti* inquiry by examining actual and "paper" job duties.

First, respondent incorrectly argues that the Second Circuit examined all of petitioners' duties, actual and inherent. In fact, the court considered only their inherent duties, stating, "[t]he idea that job performance (rather than job description) should control *Elrod-Branti* analysis has been consistently rejected by this court and others. Instead, as this authority makes clear, this court's challenge is to discern the *duties inherent* in the offices held by the plaintiff." App. 4-5 (citations omitted) (emphasis in original). In stating the issue on appeal, the Court only cited "[t]he essential nature of these last three duties," that is, "representing the County, meeting

with municipal officials, and preparing legal documents, including contracts and resolutions." App. 5.

Respondent concedes that, in *Branti*, this Court examined all of the plaintiff's job duties before determining that the First Amendment protected an assistant public defender from patronage dismissal. Resp. Brief at 18. *Branti* makes clear that courts should consider the plaintiff's actual duties, not merely inherent ones, as the issue is whether "the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective *performance of the public office involved.*" *Id.* at 518 (emphasis supplied). This Court did not qualify or limit the meaning of "performance" and the Second Circuit should have read it expansively and examined all of petitioners' job duties, inherent *and* actual. In failing to do so, the Second Circuit has departed from *Branti* and created an inter-circuit split that stands ripe for Supreme Court review.

POINT IV

THIS COURT SHOULD SETTLE AN INTER-CIRCUIT SPLIT AS TO WHETHER THE *ELROD-BRANTI* INQUIRY IS A QUESTION OF FACT OR LAW

Try as it might, respondent cannot sidestep another split which the Second Circuit exposes: whether analysis of *Elrod-Branti* protection is one of fact or law. As the certiorari petition makes clear, the circuits have split on this issue. While the Second Circuit reviewed the record *de novo* despite a jury verdict that respondent unconstitutionally terminated petitioners, the Fourth, Fifth, Seventh and Eighth Circuits let the fact-finder determine whether political affiliation relates to job performance. *See*, *Bauer v. Bosley*, 802 F.2d 1058, 1062 (8th Cir. 1986); *Soderbeck v. Burnett County, Wisconsin*, 752 F.2d 285, 288-89 (7th Cir. 1985) and *Stegmaier v. Trammel*, 597 F.2d 1027, 1034 n.8 (5th Cir. 1979); *Delong v. United States*, 621 F.2d 618, 623 (4th Cir. 1980).

In defending the opinion below, respondent states that petitioners were high-level government attorneys and the

Second Circuit could easily determine whether their job duties required political allegiance to the county. Resp. Brief at 22. In fact, the record points in only one direction: petitioners executed non-policymaking, ministerial duties and, as the jury expressly concluded, party affiliation was not an appropriate requirement for effective job performance. (App. 19) (verdict sheet). The jury verdict inherently establishes that the district court could not resolve this issue as a matter of law. As respondent concedes, "sufficiently uncertain" facts made the *Elrod-Branti* inquiry a jury question. Resp. Brief at 22 (citing *Soderbeck*, *supra*).

As the Eighth Circuit has noted, a jury's determination that *Elrod-Branti* protects a government position has practical consequences since framing the issue as factual, not legal, compels the appellate court to review the record deferentially. *Horton v. Taylor*, 767 F.2d 471, 478 (8th Cir. 1985) (citing Fed.R.Civ.P. 52(a)). By taking this question from a jury which ruled in petitioners' favor, the Second Circuit has split from the other circuits and ripened this issue for Supreme Court review.

POINT V

THE SECOND CIRCUIT'S DECISION CONFLICTS WITH A NINTH CIRCUIT DECISION WHICH CITED *ELROD-BRANTI* TO HOLD THAT GOVERNMENT ATTORNEYS MAY SECURE FIRST AMENDMENT RELIEF

The decision below also conflicts with a Ninth Circuit ruling that government lawyers are not *per se* exempt from the constitutional protections against discipline motivated by First Amendment activity. *See*, Petition at 24-25 (citing *Finkelstein v. Bergna*, 924 F.2d 1149 (9th Cir. 1991).

Finkelstein and the instant case are irreconcilable. *Finkelstein* cited *Elrod v. Burns*, 427 U.S. 347 (1976) and *Branti* to "reject the proposition that prosecutors have unfettered discretion to discipline assistant prosecutors for exercising their first amendment rights." *Id.* at 1453. This language offers

guidance in the context of qualified immunity defenses and establishes an inter-circuit split as to whether municipal attorneys enjoy free association rights. While respondent reads *Finkelstein* as a disciplinary retaliation case governed by *Connick v. Meyers*, 461 U.S. 138 (1983), in fact, Finkelstein invoked the First Amendment after his supervisor punished him for political activity, not the kind of alleged misconduct that would implicate *Connick*'s scheme weighing an employee's public speech against the need for office efficiency. *See*, *Finkelstein*, 924 F.2d at 1451 ("Finkelstein alleges that the suspension, and its announcement at a press conference, were intended to thwart his bid for office").

As *Finkelstein* conflicts with the decision below, this Court should settle the issue whether the First Amendment prohibits retaliation against government attorneys who suffer retaliation on account of their political association.

CONCLUSION

This Honorable Court should grant certiorari.

Dated: August 6, 1997
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